

No. 834.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

FRED KOSTERING,

Appellant and Defendant.

vs.

SEATTLE BREWING & MALTING
COMPANY,

Appellee and Complainant.

APPELLEE'S BRIEF.

M. S. EIENR,

Solicitor for Appellee.

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APPELLEE'S BRIEF.

The line of argument adopted by the counsel for appellant in his opening brief is doubtless familiar to the ears of this Court. It is the identical argument, invariably urged on behalf of defendants in infringement suits, ever since the law was first invoked to thwart "the endeavor of the dishonest merchant to prey upon and profit by the reputation of his "honest competitor". In accordance with the time-honored custom, counsel for appellant has dwelt at considerable length upon the very marked (?) *differences* which he conceives to exist between the alleged infringing label and the label of the complainant. He has, however, very judiciously refrained from com-

menting upon their *resemblances*.

We are informed by the affidavit of the defendant, used upon the hearing in the Court below, that when he *commenced* bottling and selling the beer of the Los Angeles Brewing Company, *less than three weeks prior to the commencement of this action*, he selected the name "Rhinegold" as the name of the beer to be bottled and sold by him, and that he ordered a *label* which would *distinguish* his beer "from any and all " other beers wheresoever and by whomsoever brewed " and bottled" (trans. p. 17). Indeed the solicitude of this defendant to avoid trespassing upon the rights of the complainant is strikingly like that of the defendant in the famous "Uneda Biscuit" case (95 Fed. Rep. 135), who asserted that, when he selected a name for his product, he took special care to select one which "should make the difference between his goods and the " complainant's distinct and plain, so that there could " be no possibility of a mistake". As the learned Justice Lacombe so well said in the opinion rendered by him in that case, "It is a curious fact that so many manufac- " turers when confronted with some well advertised trade " name or mark of a rival manufacturer, seem to find " their inventive faculties so singularly unresponsive " to their efforts to differentiate".

The complainant, Seattle Brewing and Malting Company, has for more than *eight years* last past been engaged in brewing a beer which it has designated as "Rainier" Beer. For more than *three years* last past it has been engaged in selling that beer at San Francisco, and elsewhere in the State of California, and

during all of that time, that portion of the beer which has been bottled by it, has been put up in certain dark glass bottles bearing the label of the peculiar design and color combination shown upon page 2 of the transcript. It is a matter of common knowledge in this community that the complainant's product has been very extensively advertised, and the uncontradicted averment of the bill of complaint is that complainant's beer has become widely known throughout the Pacific States and Territories and has acquired a high reputation as a useful beverage, and has commanded and still commands an extensive sale throughout the Pacific States and Territories, and especially in the State of California (trans. p. 3).

This was the situation on *March 9th, 1902, less than three weeks prior to the commencement of this action*, when the defendant, *for the first time* commenced the bottling and selling of beer in *San Francisco*. The defendant does not pretend that he was ignorant of the reputation of complainant's product, nor that he was unfamiliar with the label which complainant affixed thereto. If the fact were so, defendant would doubtless have made such claim in his affidavit, or he would at least have denied the averments of the bill in that behalf for lack of information and belief. We are entitled to presume, therefore, and also because he was engaged in the same general business, that he was familiar with the complainant's label, and that he knew of its value to the complainant, when he claims to have ordered a label, *on March 9th, 1902*, which would *distinguish* the beer bottled and sold by him from all other beers. The result of

defendant's effort to produce a distinguishing label is shown upon page 5 of the transcript. The infringing character of the latter label is perhaps better shown by a comparison of the *bottles* used by the respective parties, with the labels affixed, marked complainant's Exhibit "A" and "B", and made part of the record on this appeal.

A mere comparison of the two labels, thus affixed to the bottles, is, we submit, alone sufficient to show the infringing character of defendant's label. The bottles are of the *same shape and size* and are *identical in color*. The *labels* are exactly the same in *size*, and with the exception of the golden sheen from "the vermillion red sunset" of what counsel says "a poetic imagination will recognize as the Rhine "Falls of Schaffhausen", the color combination and the general design of the two labels are almost identical. Perhaps defendant's product was intended for consumption by persons of "poetic imagination", and this fact no doubt led to the substitution of the picture of the "Rhine Falls of Schaffhausen" on defendant's label for that of "majestic Mount Rainier" upon the label of complainant. The *scroll work*, which is such a prominent part of the labels, upon which the words "Rhinegold Beer" and "Rainier Beer" are printed, is *identical in color and design in both labels*. The *landscape views* in both labels are in exactly the same positions and enclosed in circles of exactly the same size. The *letters* used in both labels are of precisely the same size and design, and the general effect, upon the eye, of both labels,

especially when affixed to the bottles, is, upon cursory inspection, the same. It is only upon close *examination and comparison* that the differences, to which counsel directs the Court's attention, become apparent. That the *designer* of defendant's label had before him the complainant's label, is too apparent to require even assertion, much less argument. Such strict fidelity to the distinguishing characteristics of the complainant's label could not have been accidental. It cannot be conceived that two labels designed at *intervals so far apart* and by different persons, should accidentally bear so striking a resemblance to each other. As the learned Justice Lacombe, whose fame as a jurist in trade-mark cases is not confined to the circuit in which he presides, has so well said:—

“Inspection of the labels must carry conviction to any unbiased and intelligent mind, that the later label was prepared by someone who had seen the earlier one, and that it was designed, not to differentiate the goods to which it was affixed, but to simulate a resemblance to complainant's goods sufficiently strong to mislead the consumer, *although containing variations sufficient to argue about should the designer be brought into Court. This is the usual artifice of the unfair trader. It does not deceive the first purchaser from the manufacturer, but it is sufficient to mislead the subsequent retail purchaser, and thus, being sold at a less price than the genuine article, it eventually, if not enjoined, will interfere with the sales of the genuine article. It is quite common in such cases to find assertions by defendant that his goods are very superior to complainants; that he has no intention to deceive anyone; that his labels are not at all an imitation; that in designing a form of package he has carefully endeavored to select a design which*

should distinguish his goods from all other goods in the world, including complainant's. When there is a marked similarity in the labels, but little weight is given, by a Court of equity, to such statements, and the mere circumstance that they are sworn to does not tend to increase respect for them, nor for the conscientiousness of the affiants who make them."

Collinsplatt vs. Finlayson, 88 Fed. 693.

The opinion of the same Judge in the still more recent case of *National Biscuit Co. vs. Baker*, 95 Fed. 135, discloses a state of facts strikingly similar to those of the case at bar:

"Defendants present the usual voluminous bundle of affidavits by persons in the trade to the effect that in their opinion no one is likely to mistake defendant's biscuit for complainant's. As has been often pointed out before, *it makes no difference that dealers in the article are not deceived. No one expects that they will be. It is the probable experience of the consumer that the Court considers.* Here, too, we have the manufacturer of the articles complained of, who explains, as usual, that in adopting a trade name by which to identify his own product, he has been most 'careful not to trespass upon any rights of complainant, and that after considerable thought' he selected a name which should make the difference between his goods and complainant's 'distinct and plain, so that there could be no possibility of a mistake'. *It is a curious fact that so many manufacturers of proprietary articles, when confronted with some well-advertised trade name or mark of a rival manufacturer, seem to find their inventive faculties so singularly unresponsive to their efforts to differentiate.* Thus in one case, with the word 'Cottolene' before him, *defendant's best effort at differentiation* resulted in 'Cottoleo', and 'Mougolia' seemed to another defendant entirely unlike 'Magnolia'. The manufacturer of the articles

which defendants in the case at bar are selling seems to have had no better luck, for with the word 'Uneda' before him, his device to avoid confusion was the adoption of the word 'Iwanta'.

"The incessant use of the personal pronouns in daily speech has associated in every one's mind the sounds represented by the letters 'I' and 'U'; the two words are of precisely the same length; both end with the same letter, 'A'; and both express the same idea, namely, that the prospective purchaser's comfort would be promoted by the acquisition of a biscuit. *There are, as also is usual, a number of minor differences between the forms and dress of the two packages, which are expatiated upon in the affidavits and the brief; but no one can look at both packages without perceiving that there are strong resemblances, which could easily have been avoided had there been an honest effort to give defendant's goods a distinctive dress.*"

National Biscuit Co. vs. Baker, 95 Fed. 135-6.

And so in the case at bar, there are undoubtedly *differences* between the two labels, which are apparent upon comparison. Is not this always the case, and is it not always studiously so planned? Those differences however, do not, we submit, outweigh the *resemblances*, which are apparent even without examination. Why should the defendant have imitated, even in a slight degree, the distinguishing characteristics of the complainant's label? He was embarking in a new business, and he professes that he had a desire to give a distinctive name to his own product, and that he did not intend nor desire to trespass upon the rights of any other person. Surely there were other designs fully as attractive as that upon the complainant's label, perhaps even more attractive, of which the exercise of the slightest originality on the part of the designer would

have enabled the defendant to avail himself. He might even have used the picture of the "Rhine Falls of Schaffhausen" with its "vermilion-red sun "disappearing behind the hills", if he were so intent upon making his "Rhinegold" beer appeal to the taste of persons of "poetic imagination"; but he was not required to place that landscape in the same relative position upon his label as that occupied by the one on complainant's label. He might, in order to harmonize his label with the name of his product, have printed that name in letters of *gold*, or of "Rhinegold", instead of *white*, as is done in complainant's label with the word "Rainier", and there was certainly no need of his adopting the same style of lettering as that used by complainant, nor of placing the words "Rhinegold Beer" in a scroll identical in form, color and design with the scroll on complainant's label. And since the respondent was, as his learned counsel tells us, so studiously anxious to differentiate his beer from that of the complainant, presumably because of the *superior* character and quality of his product, it might have occurred to him, if he had an honest intention to differentiate, that he might actually suffer a loss of his own trade by reason of the likelihood that some people, while desirous of securing his beer, might be led astray by the resemblance of his labels and bottles to those of the complainant, and might therefore purchase the beer of the complainant instead of his own.

The defendant's label itself shows a studied purpose on the part of the designer to imitate in all essential

particulars the chief characteristics of complainant's label, and the facts of this case, it is respectfully submitted, disclose as flagrant a case of unfair competition as has ever been brought to the attention of the Court.

In the case of *Fairbanks vs. Bell Mfg. Co.*, 77 Fed., 869, the simulation of complainant's label and package was *not nearly so flagrant* as in the case at bar. (See page 874.) The Court, *in reversing an order refusing to grant an injunction*, said:

"Defendant is a manufacturer and sells only to the trade. By its salesmen it offers its soap powder in competition with complainants', as an article equal or superior thereto, and at a less price. *No effort was ever made to delude the trade into the belief that defendant's salesmen were selling complainant's goods. But equity regards the consumer as well as the middleman.* It is to him more than to the jobber or wholesale purchaser, that the various *indicia* of origin with which merchants dress up their goods appeal; and courts will not tolerate a deception devised to delude the consuming purchaser by simulating some well known and popular style of package. * * * The circumstance that, out of something like a half score of changes, every one is in the same direction, *and not one in the multitudinous other directions which were open to choice*, is, to our minds at least, *conclusive evidence of design. Such things do not happen by chance.* In thus approaching the complainant's style of package, however, *the designer has been careful with each change to stop short of identity, except in the matter of color. In consequence it has been easier to point out specific differences than to show specific likenesses. And this circumstance had great weight with the Circuit Court, as is evident from the opinion.* * * *

"There is no confusion possible in the *names* of the articles, *and the defendant has inscribed its own name, 'Buffalo Soap Powder,' in bold letters, easy*

to read. The judge who heard the cause in the Circuit was strong in the conviction that there was not a similarity calculated to mislead or deceive any buyer of ordinary prudence, that there was no danger of imposition upon any except idiots, and that people who have eyes, ears and common sense could not be beguiled by any similarity between the packages. *We are unable to reach the same conclusion*; when it is borne in mind that articles of this kind, when once they are generally known, become associated in the public mind *with the general appearance of the packages which contain them,—with the dress rather than the name—and that the ordinary retail purchaser of soap powder for consumption is not usually of a high degree of intelligence, and has never had the experience of an equity judge in analyzing the elements which make up the general appearance of a package, it is quite conceivable that a dishonest retail dealer, who kept complainant's and defendant's packages mingled together on the same shelves, some exhibiting the front panel and some the side panels to the public view, might easily palm off the one for the other upon an unsuspecting purchaser exercising the ordinary care which is to be expected of buyers of soap powder for consumption.*

N. K. Fairbanks Co. vs. Bell Mfg. Co., 77 Fed. 877.

There is much more of argument upon the same lines in the case just cited, which it is impracticable to insert within the limits of a brief, and the special attention of the Court is directed to the opinion in that case.

The attention of the Court is also directed to the following cases, all of which are *in point*, and in none of which is a more flagrant instance of fraudulent imitation disclosed than is shown in the case at bar:—

Hostetter vs. Adams, 10 Fed. 839;

Liggett & Myer Tobacco Co. vs. Hynes, 20 Fed. 883-6;

- Glen Cove Manjg Co. vs. Ludeling*, 22 Fed. 823;
Southern White Lead Co. vs. Cary, 25 Fed. 125;
Carbolic Soap Co. vs. Thompson, 25 Fed. 625;
Anheuser Busch Brewing Assn. vs. Clarke, 26 Fed. 410;
Pillsbury vs. Pillsbury &c Co., 64 Fed. 841;
Penn. Salt Mfg. Co. vs. Myers, 79 Fed. 87;
Hiram Walker Sons vs. Hockstaeder, 85 Fed. 776;
Centaur Co. vs. Killenberger, 87 Fed. 725;
Collinsplatt vs. Finlayson, 88 Fed. 693;
Von Mumm vs. Wittemann, 85 Fed. 966;
Stuart vs. F. G. Stuart Co., 91 Fed. 243;
National Biscuit Co. vs. Baker, 95 Fed. 135;
Bass vs. Feigenspan, 96 Fed. 211;
McLean vs. Fleming, 96 U. S. 253;
Rains vs. White, 52 S. W. 970;
Ft. Stanwix Canning Co. vs. Wm. McKinley Canning Co., 63 N. Y. Supp. 704;
Lalance vs. National Enamel &c Co., 109 Fed. 317;
Monopol Tobacco Works vs. Gensior, 66 N. Y. Supp. 155.

The language of Sir George Jessel in *Singer Mfg. Co. vs. Wilson*, L. R. 2nd. Ch. D. 434, which counsel has adopted as the motto of his argument, has not received the sanction of the courts of this country, whatever its value as an English precedent may be. The doctrine of that case is repudiated in all the leading cases in this country, notably in the case of *Fairbank Co. vs. Bell Mfg. Co.*, cited *supra*. Sir George asserted that he was not called upon to decide cases in favor of fools or idiots, but in favor of English people, who understood English when they see it. Apart, however, from the consideration that the ordinary retail purchaser has even a right to be careless in the purchase of well-

known brands of goods, the fact is that many people do not read English nor even understand English when they see it, and especially is this perhaps true of the beer drinking and beer buying public. ^{many of whom are foreigners and unable to read English} The true doctrine is that announced in the case of *Pillsbury vs. Pillsbury Washburn Flour Mills Co.*, 64 Fed. 847, and repeatedly affirmed as follows:

"The question, however, is of *resemblances, not differences. A test which applies only after the deviations have been pointed out favors the counterfeit.* * * * We must remember, in considering this and like cases, that *the purchaser of goods with respect to brands by which the goods are designated, is not bound to exercise a high degree of care. A specific article of approved excellence comes to be known by certain catch words easily retained in memory, or by a certain picture which the eye readily recognizes. The purchaser is required only to use that care which persons ordinarily exercise under like circumstances. He is not bound to study or reflect; he acts upon the moment. He is without the opportunity of comparison. It is only when the difference is so gross that no sensible man, acting on the instant, would be deceived, that it can be said that the purchaser ought not to be protected from imposition. Indeed, some cases have gone to the length of declaring that the purchaser has a right to be careless, and that his want of caution in inspecting brands of goods with which he supposes himself to be familiar ought not to be allowed to uphold a simulation of a brand that is designed to work a fraud upon the public. However that may be, the imitation need only to be slight if it attaches to what is most salient, for the usual inattention of a purchaser renders a good will precarious if exposed to imposition.*"

Pillsbury vs. Pillsbury Washburn Flour Mills
64 Fed. 847.

It is not necessary to take up the time of the Court

in commenting upon the cases cited by counsel for appellant. They are all cases in which the *dissimilarities* between the genuine and the alleged infringing tradema. were so marked, and there was such a *lack of resemblance*, that it was apparent upon casual observation that no infringement was attempted. In the case at bar, however, the simulation of complainant's label bears every evidence of fraudulent design, and is so flagrant in its character as imperatively to require the equitable interposition of the Court which granted the injunction. If the question were even a close one, and if the defendant had been permitted for any extended period to prosecute his business by using the objectionable label, without complaint or interruption on the part of the complainant, then there might have been some ground for refusing relief to the complainant. But this is not such a case. The application for the injunction was made just *nine days* after the defendant registered his label with the Secretary of State, and presumably before his goods could have obtained any substantial repute in the market in which they were intended to be sold. There was not the slightest reason for any simulation of complainant's label. The defendant had open to him other designs, multitudinous in number, any one of which he could have selected without laying himself open to the possibility of infringement, yet he deliberately selected a design which bears so close a resemblance to that of complainant's label that the differences are apparent only upon studied examination. In fact, the learned Judge of the lower Court, in granting the injunction, did so merely upon an inspection and comparison of

the two labels, and required no argument on behalf of complainant's counsel, merely contenting himself with the observation that defendant had apparently not made any strenuous effort to avoid imitating the complainant's label, and that if he did make such effort he had evidently not met with any marked degree of success. The defendant has certainly not shown himself to be entitled to the slightest favorable consideration from a court of equity, and the exceedingly prompt action of the complainant in attempting to defeat this unwarranted invasion of its rights is certainly a circumstance most strongly commending it to the consideration of the Court.

It is respectfully submitted that the order appealed from should be affirmed.

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Solicitor for Appellee.